Supreme Court, U.S.
FILED

981597 DEC 28 1998

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No._____

In The
Supreme Court of the United States
October Term, 1998

MARLINDA ACEA, pro se

Petitioner

v.

Automobile Club Insurance Association

Respondents

Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

MARLINDA Acea
8240 Evergreen
Detroit MI 48228
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1998

QUESTION PRESENTED

Whether harboring a vicious breed of dog (Pit Bull) in a parked car (used to transport the animal to the scene where accident occurred) should absolve the insurer of said vehicle from responsibility to fulfill claims for accidents (that occurs with the animals) as a result of the use of the vehicle to harbor and transport household pets.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Michigan Supreme Court were as follows:

MarLinda Acea
Automobile Club

Insurance Association

Becker,
Lanctot,
McCutcheon,
Schoolmaster, Taylor
& Hom
By: Richard J. Clark (P11936)
John A. Lydick (P23330)

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Petitioner

v.

Automobile Club Insurance Association

_____ *Respondents.*

Petition for Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MarLinda Acea respectfully pray that a writ of certiorari issue to review the judgment of the Michigan Supreme Court in MarLinda Acea v. Automobile Club Insurance Association (September 28, 1998).

OPINIONS BELOW

The orders of the Michigan Supreme Court denying the delayed application for leave to appeal is considered and denied because they are not persuaded that the questions presented should be reviewed by this court, are reported and reproduced in Appendix A.

The Opinions of the State of Michigan Court of Appeals is unpublished without oral argument and reproduced in Appendix B. The opinion and orders of the State of Michigan in the Circuit Court for the County of Wayne granting Summary Disposition to the defendant is reproduced in Appendix C. The orders of the State of Michigan in the Circuit Court for the County of Wayne, Notice of Entry of Judgment is reported and reproduced in Appendix D.

JURISDICTION

The Unpublished Memorandum of the State of Michigan Court of Appeals was listed unpublished on September 30, 1997. This Court has jurisdiction pursuant to MCR 7.203(A).

CONSTITUTIONAL PROVISION AND STATUE INVOLVED

The insurance company has printed a detailed publication regarding the issuance of insurance, its coverage and exclusions. Most of those exclusion are specific and used to prevent the injured from cheating and defrauding the insurer.

The depiction/characterization in the media of the use of different type of personal transporting in vehicles has often included the entire families and often family pets as well. We have seen dogs in covered wagons left unattended in a contained area of a vehicle. Now here comes, ACIA, and insurer, who are trying to dispute his practice as a means to avoid monetary judgments.

None of the exclusions covers the transportation of a family pet. Because some parties have been able to attach the family pet to the house, it has no more attachment to the house than family members or others that are included in coverage by the automobile insurance policy.

A motion under MCR 2.116 (c) (8) tests the legal sufficiency of a claim by the pleadings alone. Plaintiff has asserted a valid claim pursuant to MCR 2.116 (c) (8).

A trial court presented with a motion for summary disposition under MCR 2.116 (c) (10) must give the benefit of reasonable doubt to the non-movant and must determine whether a record might develop which will leave open an issue upon which reasonable minds could differ.

STATEMENT OF THE CASE

NOW COMES Plaintiff MarLinda Acea, by herself, that on August 26, 1994, she was viciously attacked and seriously injured by a Pit Bull owned by the Moore's and the insured of vehicle in which the accident occurred. The animal had been left unattended in the Moore's automobile with all windows closed leaving no ventilation on an 86 degree weather day. After the windows were rolled down to give the animal air, it leaped over the lowered car window and attacked the Plaintiff standing nearby. The Plaintiff had been in the company of the animal several times before and did not feel the animal posed a threat. The bulldog caused multiple injuries from bites to her face, specifically her lip and nose area, lacerated through and through. The Moore;s vehicle was insured by the Defendant Automobile Club Insurance Association (hereinafter "ACIA).

The State of Michigan Circuit Court for the County of Wayne entered a default judgement against plaintiffs, Daniella and Jonathan Moore. The same court rejected the plaintiffs claim against the automobile insurer, Automobile Club Insurance Association, of the Moores. It cited Century v. League General as the controlling authority.

The Michigan Court of Appeals, rejected the petioner's, MarLinda Acea, claim against the Automobile Club Insurance Association pursuant to MCR 7.214 (E).

The Supreme Court of the State of Michigan was not persuaded that the questions presented should be review by that court.

REASONS FOR GRANTING THE WRIT

For the following reasons, certiorari should be granted, and this case should either be remanded for reconsideration or set for briefing and argument and judgement ordered be awarded to the Plaintiff by ACIA.

There is a casual connection existing between the attack and the ownership, operation, and maintenance or use of the motor vehicle as a motor vehicle. The Plaintiff maintains that the policy affords coverage for her loss, pain and suffering.

The genuine issues of material fact exist regarding whether the loss arose out of the ownership, operation, maintenance or use of the motor vehicle as a motor vehicle under the policy, whether transporting a pet and leaving it unattended in the vehicle constitutes the use of a motor vehicle, and whether the loss is compensable under the policy.
A motion under MCR 2.116 © (8) tests the legal sufficiency of a claim by the pleadings alone. Mich. Ins. Repair Co., Inc. v Manufacturers Nat'L Bank of Detroit, 194 Mich App 668, 673, 487 NW2d 517 (1992). All factual allegations in support of the claims are accepted as true, as well as any reasonable inferences or conclusions that can be drqwn from the facts. Id. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Wade v Dept. of Corrections, 439 Mich 158, 163, 483 NW2d 26 (1992).

A trial court presented with a motion for summary disposition under MCR 2.116 (C) (10) must give the benefit of reasonable doubt to the non-movant and must determine whether a record might develop which will leave open an issue upon which reasonable minds could differ. Dumas v Auto Club Ins. Ass'n, 168 Mich App 619, 626: 425 NW2d 480 (1988). All inferences are to be drawn in favor of the non-movant. Dagen V Hastings Mutual Ins., Co., 166 Mich App 225, 229; 420 NW2d 111 (1987). Before

summary disposition may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. Peterfish v Frantz, 168 Mich App 43, 48-49; 424 NW2d 25 (1988); Arbelius v Poletti, 188 Mich App 14, 469, Nw2d 436 (1991).

Plaintiff has asserted a valid claim pursuant to MCR 2.116 (C) (8). The Moore's automobile was insured by Defendant ACIA. The policy covers losses which arise out of the ownership operation, maintenance or use of a motor vehicle as a motor vehicle. The pleadings allege that this loss arose out of the use of the motor vehicle to transport Daniella Moore and her pet bull dog to Plaintiff's home, and infer that Mrs. Moore's act in leaving the dog unattended in the vehicle during the hot summer day as she visited with Plaintiff was the cause of this loss. The inherent nature of automobiles is to transport people and their possessions, and to store or hold the possessions whether or not the occupants are present. The pleadings and inferences therefrom indicate that a sufficient causal connection exists between the use of the motor vehicle and Plaintiff's injury so as to create a duty on the part of ACIA to defend the claim against its insured and to provide coverage under the insurance policy. On the basis of the pleadings alone, the claim is enforceable as a matter of law, and a factual development could justify recovery.

Defendant maintains that except for damages, no genuine issues of material fact exist in this case. However, reasonable minds could differ regarding the issues of whether a causal connection exists between Plaintiff's loss and the use of a motor vehicle as a motor vehicle, and whether transporting a pet and leaving it unattended in the vehicle constitutes a "use" pursuant to the insurance policy and the No Fault Act.

Several other jurisdictions have found a causal connection between the use of a motor vehicle and injuries resulting from the transport and holding of a household pet with the vehicle. In Transamerica v Farmers Insurance Exchange, 463 NW2d 641 (ND 1990), an automobile insurer was held liable for injuries to a pedestrian when

the insured's dog jumped out of the bed of the insured's pickup truck and bit the pedestrian on the face as she walked by.

In both Transamerica and the instant case, the dog was left unrestrained in the insured's vehicle and attacked without provocation. The Transamerica court held that:

Carrying household pets is common use of family vehicles. The dog, Sam, would not have been close enough to the public sidewalk to bite a pedestrian in the face with the use of the pick-up to haul the dog and to hold the dog while waiting. We agree with the trial court's finding that a causal connection is present her. (Id at 643).

See also Hartford Accident and Indemnity Company v Civil Service Employee Insurance Company, App. 108 Cal Rptr 747 (1973), which also held the automobile insurer liable for dog bite injuries to a guest passenger which were sustained while the insured's dog was trying to get out of the car. The Hartford court held that:

The transportation of household pets in family cars is commonplace. In the case at bench, the fact that the Scottie was riding in the Morrison's automobile clearly involved a "use" of that vehicle. (Id at 741).

Carrying household pets is a common use of family vehicles. The Pit Bulldog was transported in the vehicle to the Acea's neighborhood and left unrestrained in the vehicle with the window partly lowered during an extremely hot summer day.

The dog had never attacked anyone in the past and exhibited no propensity for violence until that day. In fact, Plaintiff had been to the Moore's residence on several occasions prior to this attack and had petted the dog without incident. The attack would not have occurred if the bulldog had been let out of the car by Mrs. Moore when she arrived, or if it had been left at home. The extreme heat this animal suffered by being left in the vehicle caused it to react and to attack Ms. Acea, the person approaching the vehicle. The

bulldog would not have been close enough to Plaintiff to bite her with use of the vehicle to haul the dog there and to hold the dog during the visit.

Defendant cites Century v mutual Insurance v League General Insurance, 218 Mich App 114 (1995), to support its argument that dog bite injuries do not arise out of the use of an automobile. In that case, the dog owner's homeowner's insurance carrier sued the dog owner's automobile liability carrier for declaratory judgment regarding coverage of the liability claim. The court was greatly influenced by the fact that the dog owners were insured for the liability claim no matter which policy applied. (There is no homeowner's policy in the instant case). Despite the fact that no prior Michigan court had determined the issue of whether there was a causal connection between use of a motor vehicle and injuries resulting from the transport and holding of a household pet in the vehicle, the Court ignored the decisions of several other jurisdictions holding the automobile liability insurer liable on such claims. The Century Mutual court also refused to follow the decision in Michigan Mutual Liability Co. v Ohio Casualty Ins. Co., 123 Mich App 688, 333 Nw2d 327 (1983, which construed the phrase "arising out of the use of an automobile" to mean "originating from", "growing out of", or "flowing from" the use of an automobile. Id at 695. The Michigan Mutual court held that the phrase "arising out of the ownership, operation, maintenance or use of a motor vehicle" should be construed broadly to provide coverage as long as there is some casual nexus with an automobile.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari and should either remand this case for reconsideration, and set this case for briefing and argument,
Force the auto insurance carrier to accept responsibility and pay the claim against their clients, Ms. Daniella Moore and Mr. Jonathan Moore to Plaintiff.

Respectfully submitted,

MarLinda Acea, pro se

March 1999

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 111289, COA: 195431, LC: 95-520313-NO

MARLINDA ACEA

PLAINTIFF-APPELLANT,

V.

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

DEFENDANT-APPELLEE

On order of the court, the delayed application for leave to appeal is considered and it is denied , because we are not persuaded that the questions presented should be reviewed by this court, entered September 28, 1998.

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patrica J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

APPENDIX B

UNPUBLISHED
September 30, 1997

STATE OF MICHIGAN
COURT OF APPEALS

No. 195431
WAYNE CIRUIT COURT
LC No. 95-520313-NO

MARLINDA ACEA
Plaintiff-Appellant

v.

AUTOMOBILE CLUB INSURANCE ASSOCIATION,
Defendant-Appellee.

Before: Markey, P>J> and Neff and Smolenski, JJ.

In this declaratory judgment action, plaintiff appeals as of right from a determination that defendant neither owed a duty to defend no indemnify its insured, Daniella and Jonathan Moore, under a no-fault automobile insurance policy, in a lawsuit brought by plaintiff against the Moores, for injuries sustained when the Moores's dog lunged through a partially open automobile window and bit the plaintiff. This case is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

The liability that plaintiff asserted against the Moores does not arise out of the Moores' ownership, maintenance or use of a motor vehicle. Putkamer v Transamerica Ins Corp of America, 454 Mich 626; 563 NW2d 683 (1997); Century Mutual Ins Co v League General Ins Co., 213 Mich App 114, 121; 541 NW2d 272 (1995). Rather the Moore automobile was the mere site of the injury, Century Mutual, supra, and there was no showing on the instant record that one of the three exceptions to the parking exclusion set forth in MCL 500.3106(1); MSA 24.13106(1) existed, Putkamer, supra. Accordingly, defendant possesses no duty to defend or indemnify the Moores in the suit brought against them by plaintiff for injuries sustained when the Moore's dog bit plaintiff. Arco Industries Corp v American Ins Co (On Remand), 215 Mich App 633, 636;546 NW2d 709 (1996), lv gtd 454 Mich 873 (1997); Century Mutual supra.

Affirmed.

APPENDIX C

(Motion granted May 8, 1996)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

No. 95-520-313 NO

MarLinda Acea,
Plaintiff

Vs.

Automobile Club Insurance Association
Defendants

ORDER

(Summary Disposition to the Defendant)

The Defendant moves for Summary Disposition on the post-judgment garnishment action. The parties agree to the essential facts:

1. The Plaintiff suffered significant lacerations from dog bites from a dog
   Owned by the defendants insured.
2. The defendant, ACIA held an automobile policy for the benefit of the
   Dogs owner
3. The dog was an occupant of a parked vehicle when the incident occurred.

The sole issue is whether this is a covered occurrence under the policy. Reluctantly, the Court finds it is not and grants Summary Disposition to the Defendant.

The Plaintiff offers a North Dakota case, Transamerica v. Farmers Insurance Exchange 463 NW2d 641 (2nd) (1990). Its logic is persuasive. However, Century Mutual v. League General Insurance Company 213 MA 114 (1995) is the controlling authority.

Motion granted.

Judge
Cynthia D. Stephens

APPENDIX D

(Dated February 7, 1996)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

No. 95-502381 1/26/95

MarLinda Acea,
Plaintiff

Vs.

Daniella Moore and Jonathan Moore, Jointly and Severally,
Defendants.

ORDER

(NOTICE OF ENTRY OF JUDGMENT)

Please take notice that the Default Judgment in favor of Plaintiff, MarLinda Acea against Defendants Daniella and Jonathan Moore, has been submitted to the Honorable Cynthia Stephens, Wayne County Circuit Court Judge, in accordance with MCR 2.602 (B) (3), and the said judgment shall be entered by the clerk if no written objections are filed within seven days from the date hereof.

The amount of $130,000 was awarded to the Plaintiff and should be paid by the auto insurance carrier of the Moores.

Judge
Cynthia D. Stephens